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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-403

PAUL A. RICHTER & ASSOCIATES, INC., dba THE BODY SHOP,

Petitioner,

vs.

THE STATE OF CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; EDWARD J. KIRBY, THE DIRECTOR OF THE STATE OF CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; LESLIE L. CASE, DISTRICT ADMINISTRATOR OF THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Harrison W. Hertzberg,
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Joshua Kaplan,
Attorneys for Petitioner

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul A. Richter & Associates, prays that a Writ of Certiorari issue to review the decision of the Court of Appeal of the State of California, Fourth Appellate District.

JURISDICTION

The decision sought to be reviewed herein is a summary post-card denial of Petition for Writ of Mandate pursuant to §23090.5 of the California Business & Professions Code which is dated May 11, 1973, (Appendix "A"), but which was given finality for purposes of this Petition on June 7, 1973, when the Supreme Court of the State of California exercised its discretion adversely to Petitioners by denying their Petition for Hearing. (Appendix "B").

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED FOR REVIEW

1. May the State of California, by rules and regulations of the State of California Department of Alcoholic Beverage Control, constitutionally proscribe the specific and invariable nude dance performances herein which are not obscene

but which are presented in premises which the state licenses to sell alcoholic beverages?

Is the State of California, Department of Alcoholic Beverage Control Regulation 143.3 constitutional as applied?

CONSTITUTIONAL AND STATUTORY PROVISIONS.

This case involves the following constitutional and statutory provisions:

1. The First Amendment of the Constitution of the United States provides as follows: "Congress shall make no law . . . abridging the freedom of speech, . . .".

2. The Fourteenth Amendment of the Constitution of the United States provides as follows:

"Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. §23090.5 of the California Business & Professions Code provides as follows:

"No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of

mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

4. State of California, Department of Alcoholic Beverage Control Regulation No. 143.3 provides as follows:

"ENTERTAINERS AND CONDUCT. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals."

STATEMENT OF THE CASE

This case involves the constitutionality of the State of California Department of Alcoholic Beverage Control (hereinafter referred to as "DEPARTMENT") Regulation 143.3, as applied to the specific and invariable nude dance performances, an exact motion picture film replica of which is part of the record here-

in, and which are not obscene, which do not involve any semblance of "bacchanalian revelries" but which are presented in premises which the State licenses to sell alcoholic beverages.

The question here sought to be reviewed was raised at the very outset of this case when, on February 27, 1973, all of the petitioner nightclub owners herein filed a complaint for solely declaratory relief in the Superior Court of the State of California, for the County of San Diego (Case No. 339-955), wherein petitioners sought a judicial declaration that Regulation 143.3 could not be constitutionally applied to petitioners' specific and invariable dance performances which were reproduced by motion picture film attached as an exhibit to petitioners' complaint.

On or about April 27, 1973, the Superior Court sustained, without leave

to amend, a Demurrer to the Complaint on the ground that the Court was without jurisdiction in the premises by virtue of California Business & Professions Code §23090.5.

Thereafter, on May 7, 1973, petitioner filed a Petition for Writ of Mandate pursuant to California Business & Professions Code §23090.5 in the Court of Appeal of the State of California, Fourth Appellate District, wherein petitioner sought the same judicial declaration as aforesaid or in the alternative, that the Superior Court be ordered to exercise its jurisdiction in the matter. This petition was denied by a memo dated May 11, 1973. (Appendix "A").

Subsequent thereto, petitioner filed a Petition for Hearing in the Supreme Court of the State of California and such was also denied by postcard dated June 7, 1973. (Appendix "B").

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. THE DEPARTMENT'S REGULATION 143.3 IS UNCONSTITUTIONAL AS APPLIED TO THE SPECIFIC AND INVARIABLE DANCE PERFORMANCES HEREIN IN THAT SUCH APPLICATION IS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioner respectfully submits that as this Court indicated in CALIFORNIA V. LaRUE, 409 U. S. 109, 93 S. Ct. 390, 397, although Regulation 143.3 is valid on its face, its application to the dance performances herein engenders "concrete problems of constitutional dimension."

However, as of this Petition, Petitioner has not been afforded its day in Court with regard to this issue and Petitioner humbly asks this Court not to

turn a deaf ear upon Petitioner's assertions of his constitutional rights.

In direct contrast to the factual and evidentiary context of LaRUE, SUPRA the performances herein constitute communicative expression and entertainment rather than "gross sexuality" or "hardcore pornography". Clearly, the mere exposure of the nude, human form is not and never has been held to be obscene or lewd within the context herein in that nudity itself, absent sexual activity, does not constitute obscenity.

See MILLER V. CALIFORNIA, ___ U.S ___, No. 70-73, SUNSHINE BOOK CO. V. SUMMERFIELD, 355 U. S. 372, 78 S. Ct. 365, rev'g 249 F. 2d 114; MANUAL ENTERPRISES V. DAY, 270 U. S. 478, 82 S. Ct. 1432; TIMES FILM CORP. V. CITY OF CHICAGO, 355 U. S. 35, 78 S. Ct. 115; PEOPLE V. NOROFF, 67 Cal. 2d 791.

Dating at least from the decision of this Court in 1948, in WINTERS V. NEW YORK, 33 U. S. 507, 510; 68 S. Ct. 665 (wherein it was held that the line between informing and entertaining is too elusive to be drawn in terms of First Amendment protection); and confirmed by this Court's decision in JOSEPH BURSTYN, INC. V. WILSON 343 U. S. 495, 72 S. Ct. 777, the principle that "communicative entertainment" is a form of expression protected by the First Amendment has never been doubted. Consonant with this principal and as indicated in CALIFORNIA V. LaRUE, SUPRA, Petitioners submit that the dance, no less than any other dramatic stage productions, motion pictures, books or magazines, is protected by the First Amendment unless obscene under MILLER, SUPRA, simply because the First Amendment protects freedom of expression no matter how plebian the setting and whether such be

SCHACT V. UNITED STATES, 398 U. S. 58, 90 S. Ct. 1555.

This protection of the dance must necessarily follow from its very nature for a common thread woven throughout the history of the dance is that it is an expression of emotions.

> "Dancing consists in the rhythmical movements of any and all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas."

7 ENCYCLOPEDIA BRITTANICA (1945) 13-14.

> "The twentieth century has rediscovered the body; not since antiquity has it been so loved, felt and honored. Nobody really aware of what is taking place today needs to be told this

> . . . our generation does not find what it wants in the ballet . . . [and] in gossamer skirts. It cries out . . . for nature and passion."

SACHS, WORLD HISTORY OF THE DANCE, p. 477 (1963).

Thus, the dance itself must be protected by the First Amendment and petitioner respectfully submits that the nude dancing herein is not per se beyond the protection of the First Amendment such that these particular performances can be proscribed without any requirement that such be obscene under MILLER, SUPRA. Surely the Twenty-First Amendment does not repeal the First Amendment and allow the application of Rule 143.3 to the particular and specific communicative performances herein.

Petitioner respectfully submits that the application of Rule 143.3 to the specific and particular performances herein indeed engenders "concrete prob-

lems of constitutional dimension" (LaRUE SUPRA), which have indeed now arisen and are ripe to be dealt with by this Court.

CONCLUSION:

For the reasons stated above, Petitioner respectfully requests that this Court issue a Writ of Certiorari in the instant case.

Respectfully submitted,

LAW OFFICES OF HARRISON W. HERTZBERG

By (s) HARRISON W. HERTZBERG
HARRISON W. HERTZBERG
Attorneys for Petitioner.



COURT OF APPEAL — STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

4th Dist.

FILED
MAY 11 1972
JOHN R. McDOWELL, Clerk

PAUL A. RICHTER & ASSOCIATES, INC.,
Petitioner,
vs.
SUPERIOR COURT ETC., COUNTY OF SAN DIEGO,
Respondent,
THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ET AL
Real Parties in Interest.

4 Civil NO. 12682

SUPERIOR COURT NO. 339955

BY THE COURT:

The petition for writ of mandate is denied.

Brown P.J.

Copies to: Harrison W. Hertzberg-LA
Attorney General-SD
Superior Court-SD

ERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JUN 7 1973

AR SIR: *I have this day filed Order*

HEARING DENIED

re: 4 Civ. No. 12682

aul A. Richter & Assocs.

vs.

uperior Court, San Diego

Respectfully,

G. E. BISHEL
Clerk

9733-577 10-72 5M OSP

County of Los Angeles } ss

Victoria A. Peasley, being first duly sworn, says: That he is and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles a resident of the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that [1] her ~~residence~~ business address is 3550 Wilshire Blvd., Suite 1418, Los Angeles, California, that on August 28, 19 73, she served the within PETITION FOR WRIT OF CERTIORARI on the Respondent in said action or proceeding by depositing a true copy thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in a mail-box, sub-post office, substation, or mail chute (or other like facility), regularly maintained by the Government of the United States at [2] 3550 Wilshire Boulevard in the City of Los Angeles, California addressed to the attorney of record for said Respondent at the ~~residence~~ office address of said attorney, as follows: [3] "Evelle J. Younger, Atty. Gen.
Alvin J. Korobkin, Depty. Atty. Gen.
1350 Front Street, Room 5006
San Diego, California 92101."

Victoria A. Peasley
(Affiant's Signature)

Subscribed and sworn to before me August 28, 19 73

Gussie D. Abramson
NAME (TYPED OR PRINTED)

Notary Public in and for County of Los Angeles
(SEAL)

OFFICIAL SEAL
GUSSIE D. ABRAMSON
NOTARY PUBLIC, CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires August 4, 1974

I, ~~the undersigned~~, certifies that he is and was, at all times herein mentioned, an active member of the State Bar of California and not a party to the within action or proceeding; that [1]

(Attorney's Signature)

State of California. [4]

[1] Unless unusual circumstances exist, the portion that follows is the same in wording whether the affidavit or certificate is used. However, only business address may be shown if certificate is used.
[2] If deposited in the United States Post Office, cross out appropriate words and insert "in the United States Post Office". [3] Here quote from envelope name and address of addressee. [4] Notarization is essential only with the affidavit.